In the Supreme Court
OF THE
United States

OCTOBER TERM, 1926

No.

JOSEPH E. MARRON, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable William Howard Taft, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Part I.

I.

Petitioner herein deeming himself aggrieved by a decision of the Circuit Court of Appeals for the Ninth Circuit in a case in which he was the plaintiff in

error and the United States of America was the defendant in error respectfully petitions your Honorable Court to grant a writ of certiorari for the review of said decision and for reasons why such writ of certiorari should be granted he respectfully shows the following:

II.

HISTORY OF THE CASE.

The case arose in the United States District Court for the Northern District of California, Southern Division. Joseph E. Marron, the above named petitioner was indicted together with certain other persons for conspiracy among themselves and with others to the grand jury unknown to commit an offense against the United States. The indictment charged a crime under Section 37 of the Criminal Code of the United States in that the petitioner herein and the other defendants at the City and County of San Francisco in the Southern Division of the Northern District of California on the first day of May, 1923 and up to the filing of the indictment, to-wit: on the 17th of October, 1924, conspired together to violate certain provisions of the Act of Congress of October 28, 1919, commonly known as the National Prohibition Act. (Trans. pages 3-50.)

On the 5th day of January, 1925, after trial in the United States District Court, with the exception of defendant Brand who was acquitted, petitioner, together with George Birdsall, Charles Mahoney, Patrick Kissane and Joseph Gorham, were found

guilty on a general verdict. Subsequently petitioner and the defendants Birdsall, Kissane and Gorham sued out writs of error to review the judgment of conviction and the said judgment was affirmed as to all the defendants with the exception of petitioner and as to him the Court reversed the judgment and directed the lower Court to grant him a new trial. (*Marron v. U. S.*, 8 Fed. Rep., Second Series, page 251.) In accordance with that mandate Marron was again tried in the United States District Court and sued out a writ of error to the United States Circuit Court to review the judgment of conviction upon which said judgment he was sentenced to be imprisoned for two years in the United States Penitentiary at Leavenworth, Kansas, and in addition thereto to pay a fine in the sum of ten thousand dollars ($10,000.00). (Trans. page 84.)

On error to the said Circuit Court of Appeals the judgment of the said District Court was affirmed on December 13, 1926 and a rehearing was denied on the 31st day of January, 1927.

III.

The main contentions of your petitioner before the said Circuit Court of Appeals in substance were, vide (Assignment of Errors, Trans. pages 360-435 inclusive):

1. The constitutional rights of the petitioner Marron under the Fourth and Fifth Amendments to the Constitution of the United States were violated by

the reception into evidence over his objection of his private books of account, papers and documents which said private books of account, papers and documents were in the possession of the United States as the result of an illegal search and seizure.

2. The Court erroneously permitted the witness Neilsen to give evidence which if believed disclosed a separate and distinct conspiracy in no wise related to the conspiracy as alleged in the indictment or the scope of the conspiracy as gathered from the testimony elicited upon the trial (Assignment of Errors, Trans. pages 480-491 inclusive) and that the Court gave to the jury instructions which contained gravely erroneous and prejudicial errors of law upon this particular subject.

IV.

REASONS WHY WRIT SHOULD BE GRANTED.

A. The Circuit Court of Appeals for the Ninth Circuit rendered a decision in conflict with a decision of the Circuit Court of Appeals for the Second Circuit on the same matter.

B. It has decided an important question of general law in a way untenable and in conflict with the weight of authority.

C. It has decided an important question of Federal Law which has not been but should be settled by this Honorable Court.

V.

The said Circuit Court of Appeals refused to consider on the merits the first contention of petitioner, namely, that his constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States were violated by the reception into evidence over objection of his private books of account, papers and documents upon the ground and for the reason that it erroneously concluded that it was foreclosed from considering such contention by virtue of its former decision on the same point on the first appeal. (*Marron v. U. S.*, 8 Fed. Rep., Second Series, page 251.)

VI.

The first *Marron* decision upon this particular contention was bottomed upon an authority in its own Circuit, namely, *Sayers v. U. S.* (C. C. A.) 2 F. (2d) 146.

VII.

The Circuit Court of Appeals for the Second Circuit in its opinion in the case of *Kirvin v. U. S.*, 5 Fed., Second Series, 282, holds under identical facts to be hereinafter stated that the rights of petitioner under the Fourth and Fifth Amendments to the Constitution of the United States were violated.

VIII.

There is in truth and fact an absolute conflict in the decisions of the Circuit Courts of Appeal for the Ninth and Second Circuits.

IX.

THE FACTS AND THE LAW OF THE MARRON CASE.
8 FED. REP. (2ND) 251.

X.

On the second day of October, 1924 and for some time prior thereto petitioner was the lessee and occupant of those certain premises located at No. 1249 Polk Street in the City and County of San Francisco. On the first day of October, 1924, a Federal Prohibition Agent filed with the United States Commissioner for the Northern District of California his affidavit in the following words and figures, to-wit:

> "United States of America,
> Northern District of California,
> County of Alameda.—ss.
>
> On this 1st day of Oct., 1924, before me, Albert M. Hardie, a United States Commissioner in and for the Northern District of California, personally appeared C. A. Howard, who being first duly sworn, deposes and says:
>
> That he is and at all of the times herein mentioned was a Federal Prohibition Agent and as such makes this affidavit and presents the facts and circumstances hereinafter set out that heretofore came to the personal knowledge of and as positively known to affiant to exist.

That this affidavit is made for the purpose of having issued hereon and hereunder a search-warrant to search the following described premises and place, to wit: 1249 Polk St., San Francisco, Cal., including the entire second floor, flat or club, all rooms, lockers, closets, safes, shelves, sheds, drawers, basement, attic, pantries, cupboards, ice boxes. Entire premises, name of owner, or occupant, Eddie Marron.

That in and upon the aforesaid premises and place and on or about the 22nd day of Sept., 1924, intoxicating liquor as defined by Section 1 of Title II of the Act of October 28, 1919, known as the National Prohibition Act, containing one-half of one per centum or more of alcohol by volume and fit for use for beverage purposes, was then and there and now are kept, sold, possessed and bartered in violation of Title II of the said National Prohibition Act, and particularly in violation of Sections 3 and 21 of said Title II.

That affiant on or about the 22d day of September, 1924, visited the above and foregoing mentioned and described premises and purchased from the person in charge in said premises certain intoxicating liquor, to-wit: Fifteen drinks of Bourbon whiskey for which he paid fifty cents each; description of person in charge of premises: height, 5 ft. 7 in.; weight, about 165 lbs.; age, 47 yrs.; large nose, deep set eyes; slightly gray hair, high cheek bones; male.

That it will be necessary to enter the said premises and place to search the same and every part thereof in order to secure the said intoxicating liquor therein for the United States Government and that it will be impossible to secure the same or any part thereof without the aid and use of a search-warrant.

Wherefore, affiant applies for and prays that a search-warrant to enter the said premises and place and therein to search for the said intoxi-

cating liquor be issued pursuant to the statute in such cases made and provided.

C. A. HOWARD.

Subscribed and sworn to before me this 1st day of October, 1924.

ALBERT M. HARDIE,
United States Commissioner in and for the Northern District of California."

(Trans. pages 55-57.)

XI.

Thereafter and on the first day of October, 1924, a search-warrant was issued by the said United States Commissioner for the Northern District of California based upon the affidavit hereinabove referred to. The search-warrant set forth the usual formal averments and concluded with the following direction:

> "Now, therefore, pursuant to Section 25 of Title II of the said National Prohibition Act, you are hereby authorized and empowered to enter the premises and place mentioned, referred to and described in said affidavit, and every part thereof, in the day or night time and to thoroughly search the same for the following described property, to wit: Intoxicating liquor, to wit, alcohol, (jackass brandy, corn whiskey, wine of pepsin, neuropin, pensin rennin, fermented grape juice), brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, and spirituous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers, and if found to seize the same and take it into your possession to

the end that the said property may be thereafter dealt with according to law, and hereof to make due return with written inventory of the property taken by you or any or either of you, within ten days as required by law.

Witness my hand and official seal this 1st day of October, 1924.

ALBERT M. HARDIE,
United States Commissioner in and for the Northern District of California."

(Trans. pages 57-59.)

XII.

A due return was made and the property seized upon the said premises as the result of the search was inventoried upon the back of the search-warrant which inventory described in detail the various brands of alcoholic liquors seized at that time. (Trans. pages 75-76.)

XIII.

At the time of the seizure, however, of this intoxicating liquor the prohibition agents seized and carried away with them a certain ledger referred to in the testimony as the "gray ledger". The ledger purported to be a record of the business carried on at 1249 Polk Street. It showed the gross receipts and expenses and also an inventory of the liquor on hand on said date together with numerous other entries.

XIV.

At the same time and under the same circumstances the said Federal prohibition agents carried away with them numerous private memoranda and private papers of various descriptions principally telephone, gas, electric and water receipts. Neither the said ledger nor any of the other private memoranda were located upon the person of Marron who was not present at the time of the search and seizure or his co-defendant Birdsall who was present at the time the search was made and was subsequently arrested by the Federal Prohibition Officers but on the contrary the said ledger and other memoranda were located in a closet in the premises. (Trans. pages 91-131.) Prior to the time of trial of said cause petitioner Marron made and filed his petition for the return of his various books, papers and documents and made in accordance therewith motions to suppress any evidence that might be given upon the trial. These motions were denied by the lower Court and exceptions to such orders were duly taken. The motions are set forth at length in the Transcript pages 327-354.

XV.

Upon the trial before the United States District Court these various private books of account, papers and documents above referred to were introduced into evidence over petitioner's objections and exceptions duly taken thereon. (Trans. pages 91-131.)

XVI.

The gray ledger in particular was introduced into evidence as United States "Exhibit A" and testimony was given with relation thereto by Federal Prohibition agents and others. (Trans. pages 90-132.)

XVII.

The various objections to this illegal search and seizure of petitioner's private property and their subsequent introduction into evidence are designated as follows:

> "a. The seizure of the said papers, records, books of account and ledgers, was made in contravention of the rights of the petitioner under the Fourth Amendment to the Constitution of the United States of America, for *the reason that said papers, records, books of account and ledger were not particularly described in the search-warrant as things to be seized, as required by the said amendment.*
>
> b. The said papers, records, books of account and ledger were not instruments or fruits of crime, but, on the contrary, were and are the private memoranda, the private property and the private papers, documents and writings of the defendant.
>
> c. The said purported search-warrant only authorized the said Federal Prohibition Agents to search the said premises for the following described personal property, to-wit:
>
> "Intoxicating liquor, to wit, alcohol, brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice and spirituous, vinous,

malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers.

d. The said Federal Prohibition Agents above referred to, were at the time of executing the warrant, unlawfully upon the premises and were at said time and said place trespassers in taking the said papers, records, books of account and ledger.

e. The said papers, records, books of account and ledger were not upon the person of the defendant, but on the contrary were located in the said premises, heremabove referred to at a time when the defendant was not present.

f. There was neither identification of the said papers, records, books of account and ledger, nor probable cause alleged in the affidavit for the seizure of the papers, records, books of account and ledger, and that their taking was illegal and void."

XVIII.

The specifications of objections heretofore made from "a" to "f" inclusive deal with and apply to the Fourth and Fifth Amendments to the Constitution of the United States.

XIX.

The contention was made that the admission into evidence of the ledger and various other documents and papers and the consequent testimony thereon was a violation of the Fifth Amendment to the Constitution

of the United States in that your petitioner then and there became in substance and effect the unwilling source of evidence and was therefore compelled to be a witness against himself.

XX.

The Circuit Court of Appeals for the Ninth Circuit in *Marron vs. U. S.*, 8 Fed. Rep. Second Series page 251 decided that;

a. Because the Federal Prohibition Agents had authority to search the premises they had authority to seize everything of evidentiary value which they found.

b. That when the officers entered the premises they found defendant Birdsall in the unlawful possession of liquor and in the act of maintaining a common nuisance and hence that the said Birdsall was committing a misdemeanor in their presence and as an incident to a lawful arrest of Birdsall the agents were justified in searching his person and seizing the evidence of his guilt.

c. That because of the provisions of Section 10 of Title II of the National Prohibition Act (41 St. 312, Sec. 8351i of Barnes' Code 1924 Supp.; U. S. Comp. St., Par. 10138½E), petitioner and his co-defendants were required to keep and maintain such records for the purpose of public inspection at any reasonable time by a commissioner or any of his agents or any public prosecutor or by any person designated by him

and that therefore such a book was not like the private papers of a citizen.

d. That the said ledger and other private memoranda were the means and instruments of crime.

e. That the fact that the papers, books and documents were not particularly described in either the affidavit or search-warrant as provided for by the fourth article of the amendment to the Constitution was immaterial under the circumstances.

XXI.

THE FACTS AND LAW OF KIRVIN v. U. S. A. 5 FED. REP. (2ND) 282.

(1) The Facts:

A search-warrant was issued on the 18th day of December, 1923, by one of the United States Commissioners for the Southern District of New York. The affidavit upon which the search-warrant was issued alleged an unlawful sale of intoxicating liquor upon these premises and concluded with the averment that it was necessary to procure a search-warrant to search the said premises and to seize all intoxicating liquor found therein, together with any books, papers, records or documents pertaining to the sale, possession or transportation of intoxicating liquors.

A search-warrant was thereupon issued on the affidavit above referred to and after describing the premises to be searched directed the officers to search diligently "for said liquors and records" and directed the making of a return if any seizure was made under said warrant.

A seizure was made and resulted in obtaining a quantity of liquor and also a large list of books, papers and records consisting of many telegrams, invoices, receipts and various letters.

(2) The Law:

a. That the affidavit for the search-warrant referred to no record or other private memoranda being used in connection with the sale of alcohol and that there was no description of the records papers or memoranda of any kind.

b. That the failure to so describe these things did not warrant the seizure of them.

c. That such private books of account, papers and memoranda were not means or an instrument of crime although they might be some evidence of crime.

d. All papers and documents which afford evidence that a felony has been committed but which were not the means of committing it are immune from seizure.

e. The fact that the officers who were executing the warrant were lawfully on the premises did not confer upon them the right to seize such papers or records because as to them they had no search-warrant.

f. That by seizing such papers they became trespassers as to those documents.

g. That because the plaintiff in error was arrested at the time the papers were seized that fact did not make the seizure lawful because the papers were not on his person.

h. That there was neither identification of the records nor probable cause alleged in the affidavits for the seizure of the records and that their taking was illegal and therefore void.

XXII.

Your petitioner would also call attention to the fact that both the Marron and the Kirvin decisions relied upon the decision of this Court in *Gouled v. U. S.*, 255 U. S. 310, 41 S. C. T. 261, 65 Law Ed., page 647.

The holding in the *Marron* case that the character of the ledger was changed from a private document to a public record by virtue of the provisions of Section 10 of Title II of the National Prohibition Act has been expressly disapproved in the recent decision by this Honorable Court in *U. S. v. Katz,* 70 L. Ed. 554; U. S. Ct. Advance Opinions, June 15, 1926 in which case it was definitely held that the provisions of the above mentioned section respecting the keeping of records of the sales, etc. of intoxicating liquor was a requirement upon persons permitted to make the sales and not upon persons attempting to make unlawful sales.

XXIII.

The Circuit Court of Appeals for the Ninth Circuit refused to consider the decision in the *Kirvin* case and dismissed the subject with the following language:

> The defendants rely on Kirvin v. U. S. (C. C. A.) 5 F. (2d) 282. It may be conceded that this decision cannot be reconciled with the views above

expressed. We have great respect for the court which handed down this opinion, but we prefer to follow our own precedents. We still think that Sayers v. U. S. (C. C. A.) 2 F. (2d) 146, was correctly decided.

XXIV.

The testimony of the witness Nielsen disclosed a separate and independent conspiracy from the one alleged in the indictment or the scope of the conspiracy as gathered from the testimony and hence the admission of his testimony over objection constituted prejudicial error.

XXV.

Because of the said real conflict of authority and because of the said erroneous rulings of the Circuit Court of Appeals for the Ninth Circuit petitioner respectfully represents that accompanying this petition and as an exhibit thereto is a certified copy of transcript of the entire record in the case including the proceedings of the Circuit Court of Appeals for the Ninth Circuit; and hereunto annexed is petitioner's brief in support of this petition.

Wherefore because of the said real conflict of authority and because of the said erroneous rulings of the Circuit Court of Appeals of the Ninth Circuit as will be more fully expounded in the annexed brief petitioner prays that he be granted by this Honorable Court the Writ of Certiorari pursuant to the provisions of Section 240 of Judicial Code, that the writ

be directed to the United States Circuit Court of Appeals for the Ninth Circuit; that on return duly made to the writ and hearing of the case the judgment of conviction and sentence be reversed.

Dated, San Francisco,
February 19, 1927.

BENJAMIN L. MCKINLEY,
Counsel for Petitioner.

CERTIFICATE OF COUNSELLOR.

I, the undersigned, do hereby certify that in my opinion the foregoing petition is well founded and that it is not interposed for the purpose of delay.

Dated, San Francisco,
February 19, 1927.

BENJAMIN L. MCKINLEY,
Counsel for Petitioner.